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No. 98-363

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In The

Supreme Court of the United States

October Term, 1998

DOUGLAS MOORE, O'NEIL BRADFORD,

Petitioners,

vs.

TIME WARNER, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly affirmed the District Court's rejection of petitioners' copyright infringement claims on the grounds that petitioners' songs were not substantially similar to respondent's songs.

2. Whether the Ninth Circuit correctly affirmed the District Court's dismissal of petitioner O'Neil Bradford's identical second action, on the basis of claim preclusion and collateral estoppel.

PARTIES TO THE PROCEEDINGS

Petitioners are Douglas Moore and O'Neil Bradford, both appearing *pro se*. Their petition challenges a Ninth Circuit Memorandum decision in two consolidated appeals (Nos. 96-56337 and 96-56748) affirming two summary judgments adverse to petitioners.

These consolidated cases were initiated by an action styled *Moore v. Atlantic Recording Corporation*, United States District Court, Central District of California, Case No. 95-2256 JGD ("First Action"). Both petitioners were plaintiffs in the First Action. Bradford attempted to withdraw from the First Action, but the District Court specifically found that Bradford was a plaintiff in the First Action. (App. C, 18, fn.1). Petitioners sued a number of defendants in the First Action, but served only Atlantic Recording Corporation ("Atlantic"). (App. C, 18). The First Action was resolved on the merits of the copyright claim by way of summary judgment in favor of Atlantic on July 31, 1996 (App. C), in which the District Court ruled that the matters were not substantially similar.

On July 22, 1996, petitioner O'Neil Bradford filed an action in the Superior Court of the State of California, County of Los Angeles, entitled *Bradford v. Time Warner Inc.*, Case No. BC 154 147 ("Second Action"). Although Bradford sued forty-one defendants in the Second Action, he served only Atlantic, EMI Music Publishing Inc. ("EMI"), and Charles Koppleman ("Koppleman"). (App. B, 7). On September 2, 1996, Atlantic removed the Second Action to the District Court, where it was assigned Case No. 96-5877 JGD. EMI and Koppleman, the only other parties served, joined in this removal. (App. B, 6). On October 31, 1996, the District Court granted Atlantic's motion to dismiss, in which EMI and Koppleman joined. (App. B).

Petitioners appealed to the Ninth Circuit Court of Appeals from the dismissals of the First Action and Second Action. The Ninth Circuit consolidated these appeals, and on December 19, 1997, affirmed the judgments against petitioners. (App. A). On March 27, 1998, the Ninth Circuit rejected petitioners' request for rehearing *en banc*. (App. A). On August 31, 1998, the Supreme Court docketed this petition.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Sup. Ct. Rule 29.6, Atlantic is a corporation. Atlantic's parent corporation is Warner Communications, Inc. Warner Communications, Inc.'s parent corporation is Time Warner, Inc. Atlantic does not have any nonwholly owned subsidiaries.

Respondent EMI Entertainment World, Inc., erroneously sued as EMI Music Publ., Inc. is ultimately owned by EMI Group plc, which has issued shares to the public that are traded on the London Stock Exchange.

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STATEMENT OF THE CASE

Petitioners initially filed a copyright infringement lawsuit in federal court, which was rejected on the merits on summary judgment. Undaunted, one of the petitioners filed an identical state court lawsuit, which was removed to the District Court. The District Court dismissed the second suit on the doctrine of *res judicata* and collateral estoppel. Petitioners then appealed their two defeats to the Ninth Circuit, which affirmed the judgments against them. They also pursued an appeal in the state appellate court, which was rejected. The state appellate court held that any disputes regarding the propriety of the federal court's jurisdiction or the merits of petitioners' claims should be resolved by the federal court. Petitioners did not seek review of that decision from the state's highest court. Instead, petitioners now request that *this* Court consider claims which have been rejected by a United States District Court (twice), a federal Circuit Court of Appeal, a state trial court, and a state appellate court — although petitioners' persistence is not justified by the merits of their claims.

Petitioners' claims on the merits are simply whether Atlantic infringed copyrights owned by petitioners for two songs, "From the Heart" and "Sexxy (sic) Nights," by copying the music from these songs in two recordings, "I Wanna Be Down" and "Baby." [App. C, 18-19].

Atlantic moved for summary judgment on the basis that "I Wanna Be Down" and "Baby" were not substantially similar to "From the Heart" and "Sexxy Nights." The District Court specifically found (a finding affirmed by the Ninth Circuit) that under the extrinsic test of *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1164 (9th Cir. 1977), Atlantic's songs were *not* substantially similar to petitioners' works. The District Court granted Atlantic's motion to dismiss

the Second Action, finding the doctrines of res judicata and collateral estoppel "clearly applicable."

Petitioners offer no coherent reason why these specific findings should now be rejected. Accordingly, their petition should be dismissed.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS ASSERT NO COMPELLING REASONS FOR GRANTING REVIEW

Review on a petition for writ of *certiorari* is granted only for "compelling reasons." Sup. Ct. R. 10. Petitioners present no reasons whatsoever, compelling or otherwise, why the Court should grant their petition.

Ignoring the prior decisions and the posture of this case, petitioners first argue that the Court should grant review to insure "proper enforcement of jurisdictional issues." (Pet., 4). Petitioners suggest that the Second Action was improvidently removed to the district court because "all defendants" allegedly did not join in the removal of the Second Action. (Pet., 5). This point, even if true — which it is not — does not fall within one of the enumerated bases for granting review. *See*, Sup. Ct. R. 10(a), (b) and (c).

Petitioner Bradford sued *forty-one* defendants in the Second Action, yet served only three of them; Atlantic, EMI, and Koppleman. (App. B, 7). Petitioners cite no authority for the ridiculous proposition that 38 *unserved* defendants must join a Notice of Removal, to be effective — nor can they. Instead, petitioners cite *Teitelbaum v. Soloski*, 843 F. Supp. 614, 615

(D.C. Cal. 1994), a case where a defendant actually received the summons and complaint, but did not timely join in a co-defendants' removal petition. In contrast, petitioner Bradford sued, but never served thirty-eight defendants. Here, all of the defendants which were actually served with the Second Action joined in its removal. (App. B, 7). Only parties served with a lawsuit need join in its removal. *Salveson v. Western States Bankcard Association*, 731 F.2d 1423, 1429 (9th Cir. 1984). Bradford's zeal in suing unnecessary parties, but failing to serve them, should not, and does not, provide any justification for vacating the decisions of the lower courts.

In addition, petitioners did not raise their claim that the Second Action was improperly removed before either the District Court or the Circuit Court. Accordingly, they are not entitled to raise this issue for the first time before this Court. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992). Instead, petitioner Bradford opposed the motion to dismiss the Second Action on the basis that he was not a plaintiff in the First Action. (App. B, 8). The District Court properly rejected this claim.

Petitioners also intimate that they have not had *any adjudication* of the state court claims contained within the Second Action. (Pet., 4). It is hornbook law that removal of an action removes *all* claims. 28 U.S.C. § 1441(a); *Dillon v. State of Mississippi Military Dept.*, 23 F.3d 915, 918 (5th Cir. 1994). Indeed, the Second Action contained precisely the same state court claims as the First Action. (App. B, 9).

Petitioners argue that review should be granted to "instruct lower courts" regarding the ownership and registration of copyrighted materials. (Pet., 5). This is not a ground for this Court to grant review in *this* case, in which the ruling followed well-established copyright principles. There is no need for any

such instruction on these issues, especially as they relate to petitioners' claims. Indeed, the District Court granted summary judgment based upon an application of the well established "extrinsic test" to determine substantial similarity first announced in *Krofft v. McDonald's, Inc., supra*. A substantial body of copyright law has developed from the *Krofft* decision, involving hundreds of reported decisions in every Circuit. There is no reason for this Court to consider this issue anew.

Finally, petitioners argue that this Court should grant review because "the district court did not properly apply the 'extrinsic' test . . ." (Pet., 7). Not only did the District Court properly apply the correct legal standard; but this issue is precisely the type upon which the Court should *deny* review. *See* Sup. Ct. R. 10 (review is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.") Petitioners do not suggest that either lower court misstated the correct legal rule. Nor do petitioners suggest there is any split among the Circuits on this issue.

In sum, petitioners have not identified any of the Rule 10 considerations typically provided for granting review, and review should therefore be denied.

II.

PETITIONERS OFFER NO BASIS ON WHICH TO REVERSE THE LOWER COURTS' DECISIONS

Not only do petitioners fail to identify a compelling reason to grant review; they fail to cast any doubt on the correctness of the lower courts' decisions.

Petitioners argue they should prevail because *respondent* allegedly has not filed copyright registrations. This argument

turns the applicable legal standard upside down. To succeed on their copyright infringement claims, it is *petitioners* who must establish (1) ownership of their copyrights and (2) copying of a protectible expression. *Baxter v. MCA, Inc.*, 812 F.2d 421, 423 (9th Cir. 1987). Whether *respondent* registered its copyrights is immaterial.

Petitioners also argue that summary judgment should not have been granted against them because they submitted an unsworn letter from a purported expert witness which allegedly created a triable issue of fact. However, the federal rules of civil procedure provide that a party opposing a motion for summary judgment must submit "affidavits . . . made on personal knowledge [which], shall set forth such facts as would be admissible in evidence." Fed. Civ. Proc. R. 56(e). An opposing party can even request a continuance of a hearing in order to allow sufficient time to obtain appropriate affidavits. Fed. Civ. Proc. R. 56(f). The District Court found petitioners' "letter" to be inadmissible, another finding upheld by the Ninth Circuit. Moreover, the District Court found that even if the "letter" were admissible, "it fails to demonstrate a genuine issue of material fact as to substantial similarity." (App. C, 26).

Next, petitioners claim their songs are substantially similar to respondent's recordings. The District Court specifically found to the contrary. Petitioners do not suggest that this Court can overturn this factual finding.

The District Court's finding was based upon an application of the *Krofft* "extrinsic test" which can be used to establish the second of the prima facie elements of a copyright infringement claim — copying of a protectible expression. *Baxter*, *supra*. As stated in *Krofft*, the test

> is extrinsic because it depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. Such criteria include the type of artwork involved, the materials used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate. Moreover, this question may often be decided as a matter of law.

Krofft, at 1164.

The District Court conducted precisely such an analytic dissection of the respective songs, and considered the expert testimony of both parties — even though it was not obligated to consider petitioners' inadmissible expert "letter." It found that the "only similarities between the works are that they are written in the same key and begin with the same tonic minor chord." (App. C, 25). The District Court further noted that these same similarities are found in many songs, including such diverse recordings as

> *You Lied to Me*, by Cathy Dennis, Shep Pettibone, and Tony Shimki (1992); *Keep Coming Back* by Richard Marx (1991); *Real Love*, by Jody Watley and Andra Cymore (1989); *Visions*, by Stevie Wonder (1973); and *Light My Fire*, by the Doors (1967).

(App. C, 20-21).

In sum, the District Court made a specific finding that petitioners could not establish the central point of their case. The Ninth Circuit affirmed this finding. This Court should not now consider overturning these factual findings.

Additionally, petitioner Bradford contends that the District Court should not have dismissed the Second Action on *res judicata* grounds. The District Court held that

> this is a paradignmatic (sic) case for res judicata and collateral estoppel, and both doctrines are clearly applicable. Bradford attempts in the instant suit to relitigate exactly the same claims and issues he raised as a party in the [First Action] . . .

(App. B, 6). On this issue, the Ninth Circuit agreed. "The district court properly concluded that Bradford's action was barred under the doctrines of claim preclusion and issue preclusion." (App. A, 5). Petitioners offer no reason why this Court should reexamine this issue.

Both the District Court and the Ninth Circuit correctly analyzed the factual basis of petitioners' claims, and applied the correct legal rules. Both courts concluded petitioners had no claims against respondents. There is no need for this Court to prolong this case, only to come to the same inevitable conclusion.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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